

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED.

7 September 2023

DATE

SIGNATURE

Case no.: **32422/2015**

In the matter between:

KUNENE IRVIN AYANDA

PLAINTIFF

And

MINISTER OF POLICE

DEFENDANT

Coram:

Dlamini J.

Date of hearing:

16 - 23 January 2023, & 17 August 2023.

Delivered:

07 September 2023.

JUDGMENT

DLAMINI J

INTRODUCTION

- [1] This is a claim for damages brought by the plaintiff against the defendant for injuries he suffered allegedly at the hands of the police officers at a shooting incident that occurred on 07 August 2013.
- [2] The defendant is opposing the claim. In their plea to the plaintiff's particulars of claim, the defendant pleads as follows;
- 2.1 The plaintiff intentionally and unlawfully drove his vehicle in the direction of the police in an attempt to kill and or knock down one of the police members on the basis that the plaintiff drove his motor vehicle in the direction of the police in an attempt to kill and or knock one of the police members over, whilst a gunshot was also fired at the same time at the police member.
- 2.2 The member of the police then lawfully fired a shot(s) back to ward off the unlawful attack on him in self-defence.
- [3] By agreement between the parties, there was separation of issues and only the issue of liability was to be decided by this Court.
- [4] Evidence in this trial was adduced before this Court from 16 January 2023 to 23 January 2023. The transcript of the record was duly obtained by the parties on 07 March 2023.

- [5] It was by agreement between the parties, confirmed that the defendant will file its heads of argument by 24 March 2023 and the plaintiff to file its heads of argument on 06 April 2023. The defendant was to file its replying heads of argument on 14 April 2023. The matter proceeded for oral argument on 17 August 2023.
- [6] At the hearing of the matter, I made a ruling that the onus rested on the defendants to prove that they were acting in self-defence as they allege they did when they injured the plaintiff.
- [7] It is a trite and well-established principle of our law that where self-defence is raised as a ground of defense, the *onus* then shifts and lies squarely, as in this present case on the defendant to prove that all the prevailing circumstances gave him no choice but to act in self-defense. In *Mugwena And Another v The Minister of Safety and Security*¹ the Court at [25] captured this principle thus "It bears noting that the *onus* rest on the police to prove on a preponderance of probabilities that the shooting of the deceased was justifiable (*Mabaso v Felix 1981 (3) SA 865 (A)*).
- [8] The defendant proceeded and called Mrs. Karen Smook, police Constable Mahlangu, and Sergeant Yende to testify on its behalf. The plaintiff testified and called his mother Mrs. Yende and his friend Mr. Bongani Mahungela to testify on his behalf.

DEFENDANT'S CASE

Karen Smook

- [9] The essence of Mrs. Smook's evidence is that she was hijacked on the evening of 06 August 2013, and her motor vehicle a Ford Fiesta was taken away by unknown persons. She was not present during the shooting incident at Pick n Pay, and her evidence offered no assistance in this regard.

¹ 2006 (4) SA 150 (SCA)

Constable Mahlangu

- [10] Constable Mahlangu, it should be noted did not witness the shooting incident. He testified that on the day of the shooting incident, he held the rank of Constable in the South African Police Service and was stationed at the Gauteng Provincial Head Office under the Tracking Team. He says that on 07 August 2013, he was on duty with Sgt Yende. He and Yende were sitting outside the Pick n Pay shopping center having lunch.

- [11] While seated and eating he noticed a Ford Fiesta that was parked directly facing him. He said he contacted the radio command center to check for any adverse information on the Ford Fiesta. The report back from the radio control center was that the Ford Fiesta was the subject of a hijacking the previous night and was sought as per Brackendows Police Station in Alberton.

- [12] Const Mahlangu, says that upon learning of the Fiesta's status, he then called for backup and assistance to the scene. While waiting for backup, a white Toyota Corolla drove into the shopping center and parked behind the Ford Fiesta. The driver of the Corolla alighted out of the car and approached the Fiesta. That person (later on turned out to be Mr. Mahungela), opened the Fiesta and got into the driver seat while the passenger of the Corolla moved into the Corolla's driver seat.

- [13] Both Const Mahlangu and Sgt Yende ordered the driver to get out of the Fiesta and to lie down. He continues and says that the Toyota Corolla drove towards Sgt Yende in an attempt to knock down Sgt Yende. At the same, he saw the Ford Fiesta suspect running away. He says he then chased the suspect and arrested him a few blocks away from the shopping center.

- [14] As a result of his chase of the Fiesta suspect, Const Mahlangu avers that he did not witness the shooting incident between Sgt Yende and the Corolla driver.

Sergeant Yende

- [15] In the main, Sgt Yende confirms in essence Const Mahlangu's evidence of how they arrived and were seated at the Pick n Pay center. He avers that the Toyota Corolla drove towards him, in the manner that the Corolla wanted to knock him down. He insisted that he believed that his life was in danger and therefore in self-defence, he fired one warning shot toward the Corolla and thereafter fired two more shots at the Corolla to ward off the danger. According to him when he fired the two further short at the Corolla, it had already driven past him. It was a few meters away from him and he avers that he aimed at the tires of the Corolla. He confirms that none of his shots hit the Corolla's tires.
- [16] In summation, the two police officers were not open and frank in their testimony. They did not come across as credible witnesses. Their version was riddled with contradictions and improbabilities and stood to be rejected. For instance, both officers gave different testimonies in this Court of what transpired at the Pick n Pay vis-à-vis what they testified in their arresting statements, at the criminal trial of the plaintiff, and in their pleadings. Sgt Yende gave a completely different testimony in his evidence in this Court, completely at odds with his plea that the plaintiff drove his vehicle towards him in an attempt to kill him or knock him over as it appears from his plea. See paragraphs 2.1 and 2.2 above.

PLAINTIFF'S CASE

Mrs. Aria Kunene

- [17] At the outset, it must be pointed out that the plaintiff's mother Mrs. Aria Kunene was not present at Pick n Pay where the shooting incident occurred. She testified that the plaintiff had an upset stomach on the evening of 06 August 2013. On the morning of 07 August 2013, she asked the plaintiff to go buy some fat cakes. Later on that day, she learned that her son was shot at by the police and was now paralysed.

[18] Under cross-examination, much was made of the fact that Mrs. Kunene could recall the events of the 06 and 07 August 2013 but could not recall the events and whereabouts of the plaintiff on any other dates that were put to her during cross-examination. Further, she never went to the police to give a written statement in respect of the alibi of the plaintiff.

[19] The criticism of Mrs. Kunene in this regard is unjustified. Her explanation that the date of 07 August 2013 remains patched in her memory because that is the date she heard that her son, (the plaintiff) had been injured and paralysed, is plausible as any reasonable mother would recall such an event. In any event, as I have indicated earlier Mrs. Kunene was not present during the shooting incident and her evidence is of no assistance in that regard.

A I Kunene ("The Plaintiff")

[20] The plaintiff testified that on the day he gave his friend Mr. Mahungela a lift and dropped the friend at the Pick n Pay shopping center. As he was driving out of the center he heard a gunshot being fired towards his car. The next moment a bullet penetrated his neck, he became numb and his car came to stand still. He then discovered he could not move and he was now paralysed from the neck down to his legs. He denies that he attempted to knock down Sgt Yende nor attempted to shoot the police officer. He insists that he does not possess a firearm nor carried one on the day of the shooting incident.

[21] Questions were put to the plaintiff under cross-examination relating to his previous convictions, the fact that he did not have a driver's license, and his relationship with Mr. Mahungela. Nothing turns on these questions as they were unrelated to the shooting incident and the identity of the person who shot at and injured the plaintiff. In any event, the plaintiff received a section 174² discharge for the crime of hijacking the Ford Fiesta and attempted murder.

² Criminal Procedure Act 51 of 1977.

Bongani Mahungela

- [22] Mr. Mahungela confirmed that on the day he had requested the plaintiff to give him a lift and for the plaintiff to drop him off at the Pick n Pay center, which the plaintiff did. However, Mr. Mahungela admits that he did not witness the shooting incident as he ran away from the scene and was later on apprehended by Const Mahlangu. The rest of Mr. Mahungela's evidence offers no assistance.

ISSUE FOR DISCUSSION

- [23] The question to be decided is firstly who in the light of all the evidence presented fired the gunshot that injured the plaintiff. Once that has been decided, the next question is whether that person was acting in self-defense or putative self-defense.
- [24] At the hearing of argument Counsel for the defendant conceded that taking into account all the probabilities of the case, the evidence points to the fact that Sgt Yende is the person who fired the gunshot that injured the plaintiff. That conceded, the next question to be answered is whether Sgt Yende was acting in self-defense or for that matter putative self- defense.
- [25] The high watermark of the defendant's submission is that this court should find that Sgt Yende was acting in self-defence alternatively in putative self-defence when he fired the shot that paralysed the plaintiff. For instance, insists the defendant that the situation was fluid, that the events on the day were all happening at the same time, and Sgt Yende had no opportunity to think and plan an appropriate reaction to the situation. For this submission, the defendant seeks reliance in *S v Makwanyane and Another*.³

³ 1995 (3) SA 391 (CC)

- [26] The principles of putative self-defence are trite and have been pronounced upon in numerous decisions of our Courts. The legal requirement to prove self-defence is a reasonable belief of immediate danger of death or grievous bodily harm from the assailant. The pertinent question to be answered is whether a reasonable police officer in the position of Sgt Yende would have acted differently.
- [27] The defendant's submission in this regard has no merit and stands to be dismissed. There was no evidence presented to this Court that the plaintiff drove his vehicle in the direction of Sgt Yende in an attempt to kill the police officer. In Sgt Yende's testimony, the plaintiff's motor vehicle had driven past him when he fired two gunshots that according to him were aimed at the tires of the plaintiff's car.
- [28] In Yende's version, the danger (if there was any and there was none) had already passed when he shot at the plaintiff's car. Significantly, the plaintiff did not fire any gunshot towards the police or Sgt Yende in particular. No weapons or any firearms were found in the person of the plaintiff or his motor vehicle. The plaintiff was shot in the back of his neck whilst he was simply driving out of the shopping after dropping off his friend Bongani who had earlier asked the plaintiff for a lift. The plaintiff posed no danger to Sgt Yende. Consequently, the defendant's defense of putative self-defence should not succeed.
- [29] In light of the above, it is my view that the defendant has failed to discharge the onus that rested on its shoulders that the police officer acted in self - defence nor in putative self-defence as they allege.

ORDER

1. The defendant is ordered to compensate the plaintiff for all his proven or agreed damage arising from the unlawful assault perpetrated on him.
2. The defendant is ordered to pay the costs of the plaintiff.



DLAMINI J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 16 - 23 January 2023, & 17 August 2023.

Delivered: 07 September 2023.

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